



JOHN LEZDEY & ASSOCIATES
SUITE 118
2401 WEST BAY DRIVE
LARGO, FL 33770

COPY MAILED

SEP 07 2007

OFFICE OF PETITIONS

In re Application of :
John Lezdey and Jarrett Lezdey :
Application No. 10/001,311 :
Filed: November 23, 2001 :
Attorney Docket No. 1434-C :
For: Antimicrobial Compositions :

Decision on Petition

This is a decision on the petition under 37 CFR 1.137(a), filed July 2, 2007, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. Any reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

Facts:

The above-identified application became abandoned for failure to reply in a timely manner to the final Office action mailed June 23, 2004, which set a shortened statutory period for reply of three (3) months.

"The Official Action dated June 23, 2004 was received and a response was prepared to be filed before September 23, 2004."¹

On August 7, 2004, while in Cape Cod, Attorney John Lezdey, suffered an accident. The accident resulted in spinal fracture and limited leg movement.

Attorney Lezdey states, "In the hospitals, Petitioner was bed ridden and had no files because he expected to return to the Florida office by September 1, 2004."²

¹ March 14, 2005 petition.

² July 2, 2007 petition.

Attorney Lezdey was hospitalized until September 10, 2004.

Since no extensions of time under the provisions of 37 CFR 1.136(a) were obtained, the application became abandoned as of midnight on September 23, 2004.

On September 24, 2004, Attorney Lezdey signed two application transmittal sheets, fee transmittal sheets, and two Certificates of Express Mailing (hereafter "COE"). The resulting applications are Application No. 10/951,051 and Application No. 10/951,190.

On September 27, 2004, Attorney Lezdey signed an application transmittal sheet, fee transmittal sheet, and a COE. The resulting application was Application No. 29/214,128. The Office notes, although the COE date is September 27, 2004, Office records indicate the date-in on the Express Mail label was September 28, 2004.

Attorney Lezdey underwent physical therapy until October 2004.

Attorney Lezdey returned to Florida on November 24, 2004. Attorney Lezdey states he did not return to the Office until December 3, 2004.

The papers filed for Application No. 10/999,037, are inconsistent. The date by Attorney Lezdey's signatures on the application transmittal page and the fee transmittal page is December 1, 2004. However, the COE date was November 29, 2004, and the application was assigned a filing date of November 29, 2004.

On December 6, 2007, Attorney Lezdey signed an application transmittal sheet, fee transmittal sheet, and a COE. The resulting application was Application No. 11/006,279. The Office notes, although the COE date is December 7, 2004, Office records indicate the date-in on the Express Mail label was December 8, 2004.

On December 9, 2007, Attorney Lezdey signed an application transmittal sheet, fee transmittal sheet, and a COE. The resulting application was Application No. 11/010,028. The Office notes, although the COE date is December 9, 2004, Office records indicate the date-in on the Express Mail label was December 10, 2004.

Attorney Lezdey filed Application no. 11/010,219 on December 10, 2004. The Office notes the COE date appears to disagree with the date-in on the Express Mail label.

Attorney Lezdey filed Application no. 11/018,620 on December 21, 2004.

Attorney Lezdey filed Application no. 11/021,589 on December 22, 2004.

A reply to the June 23, 2004 Office action, mailed for the instant application, could have been timely filed as late as December 23, 2004, with payment for a three-month extension of time. In other words, petitioner could have prevented the abandonment of the instant application by filing a reply and payment for a three-month extension of time on or before December 23, 2004.

The current petition states, "In January, 2005 Petitioner filed a Petition to Make Special and to request that the Petition also be considered as Unintentional. This petition was filed after Petitioner returned to Florida."

Office records fail to indicate any papers were filed in the instant application during January of 2005.

Attorney Lezdey filed Application no. 11/030,626 on January 6, 2005.

Attorney Lezdey filed Application no. 11/030,826 on January 7, 2005.

Attorney Lezday filed Application no. 10/041,128 on January 21, 2005. The Office notes the COE date appears to disagree with the date-in on the Express Mail label.

A Notice of Abandonment was mailed for the instant application on February 14, 2005.

Attorney Lezdey has stated, "It was not know[n] that the application was abandoned until the Notice of Abandonment was received."³

A petition under 37 CFR 1.137(a) was filed March 14, 2005 (Certificate of Mailing date of March 10, 2005).

A decision dismissing the March 14, 2005 petition was mailed June 29, 2005. The decision stated,

Any request for reconsideration should fully discuss *all* papers filed by petitioner with the Office between August 7, 2004, and March 14, 2005. In addition, any such request should fully discuss the extent to which petitioner handled other work-related matters during the relevant time period. For example, was petitioner able to attend any court hearings or file papers with any courts during the time from August 7, 2004, and March 14, 2005?

The June 29, 2005 decision stated, "Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted."

A request to change the address of record was filed September 8, 2005.

A renewed petition was not filed until December 26, 2006. The renewed petition stated a continuation-in-part application had been filed and petitioner wished to revive the application solely for copendency.

The December 26, 2006 renewed petition failed to discuss papers filed by petitioner with the Office between August 7, 2004, and March 14, 2005. The renewed petition failed to discuss the extent to which petitioner handled other work-related matters during the relevant time period.

³ March 14, 2005 petition.

A petition to make special was filed January 13, 2006. The Office notes the petition to make special is currently moot since petitioner seeks to revive the instant application solely for copendency with the continuation-in-part application.

A decision dismissing the December 26, 2006 was mailed May 1, 2007. The decision repeated the following statement made in the prior decision:

Any request for reconsideration should fully discuss *all* papers filed by petitioner with the Office between August 7, 2004, and March 14, 2005. In addition, any such request should fully discuss the extent to which petitioner handled other work-related matters during the relevant time period. For example, was petitioner able to attend any court hearings or file papers with any courts during the time from August 7, 2004, and March 14, 2005?

The December 26, 2006 renewed petition was filed almost 18 months after the mailing date of the June 29, 2005 decision. The renewed petition was filed beyond the maximum extendable period of time set in the June 29, 2005 decision. The renewed petition failed to provide any explanation for the almost 18 months of delay. The May 1, 2007 decision stated,

The instant petition is untimely. The June 26, 2005 decision stated, "Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted." The instant petition was not filed until 18 months after the mailing of the June 26, 2005 decision. Therefore, the petition is dismissed as untimely.

The instant petition was filed July 2, 2007.

Discussion:

A grantable petition under 37 CFR 1.137(a) must be accompanied by a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable.

"[T]he question of whether an applicant's delay in prosecuting an application was unavoidable must be decided on a case-by-case basis, taking all of the facts and circumstances into account."⁴ The general question asked by the Office is: "Did petitioner act as a reasonable and prudent person in relation to his most important business?"⁵

Petitioner has failed to prove the entire delay in filing a grantable petition was unavoidable.

⁴ Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (1982).

⁵ See In re Mattullath, 38 App. D.C. 497 (D.C. Cir. 1912).

The period of delay prior to March 14, 2005:

Petitioner has stated, "The Official Action dated June 23, 2004 was received and a response was prepared to be filed before September 23, 2004."⁶ Petitioner has stated, "The applications [filed during September and November of 2004] were in condition for filing prior to the accident and were awaiting Petitioner's return."⁷

Petitioner has failed to prove Attorney Lezdey's was able to sign and mail several applications, but was unable to sign and mail the prepared reply to the June 23, 2004 Office action.

If all the applications mailed during September and November of 2004 were fully prepared prior to the accident, why did petitioner not mail the applications prior to going to Cape Cod?

After Attorney Lezdey's return to the Office, but prior to December 23, 2004, Attorney Lezdey filed five different applications. If Attorney Lezdey was able to file five applications, why was he unable to file the reply to the June 23, 2004 Office action along with a request for a three-month extension of time?

Attorney Lezdey has stated, "It was not know[n] that the application was abandoned until the Notice of Abandonment was received."⁸ Attorney Lezdey has failed to distinguish and discuss the period of delay arising from his failure to know he needed to file a reply rather than his health condition. Petitioner must prove the entire delay in the submission of a grantable petition was unavoidable. The Office notes a petition under 37 CFR 1.137(a) was not filed until March 14, 2005 (Certificate of Mailing date of March 10, 2005).

Petitioner has still not discussed all papers filed by petitioner with the Office between August 7, 2004, and March 14, 2005. The instant petition fails to discuss the extent to which petitioner handled other work-related matters during the relevant time period.

The period of delay from June 29, 2005 until December 26, 2006:

The June 29, 2005 decision stated, "Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted."

A renewed petition was not filed until December 26, 2006. The renewed petition fails to establish the December 26, 2006 petition was timely or prove the delay in filing the December 26, 2006 petition was unavoidable.

In order for the requested relief to be granted, petitioner must prove the entire delay in filing a grantable petition was unavoidable.

⁶ March 14, 2005 petition.

⁷ July 2, 2007 petition.

⁸ March 14, 2005 petition.

Conclusion:

Petitioner has failed to prove the entire delay in the filing of a grantable petition was unavoidable. Therefore, the petition is dismissed.

Petitioner may wish to consider filing a petition to revive based on unintentional abandonment under 37 CFR 1.137(b). A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by the required reply (already submitted), the required petition fee (\$750 for a small entity), and a statement that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional.

A version of the form which can be completed online, and then printed and mailed, can be found at <http://www.uspto.gov/web/forms/index.html>. Petitioner can scroll down to form PTO/SB/64 and click on 64a in the second column to the right.

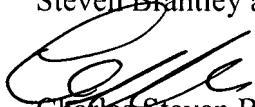
Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By facsimile: (571) 273-8300
 Attn: Office of Petitions

By hand: U.S. Patent and Trademark Office
 Customer Service Window
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

Telephone inquiries regarding this communication should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.



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